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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 600

AVIS B. VOORHES, WILLIAM G. VOORHES, and RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, GOVERNOR OF THE STATE OF CONNECTICUT, and ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

For Appellees:

HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

MOTION TO AFFIRM

The appellees in this case move to affirm the judgment of the United States District Court for the District of Connecticut on the ground that it is manifest that the questions on which the decision depends are so unsubstantial as not to need further argument.

Dated November 16, 1964.

Respectfully submitted,

Appellees

By: HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES RE MOTION TO AFFIRM

For Appellees:

HAROLD M. MULVEY,
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JURISDICTION

Although the present action is brought under the Civil Rights Acts 42 U.S.C., Sections 1983 and 1988, and 28 U.S.C., Section 1343, the appellees claim that the judgment dismissing the action should be affirmed since the complaint is fatally deficient in that it fails to state a cause of action showing the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States and it fails to allege any federal statute upon which relief may be granted.

The only federal statute cited by the plaintiffs in the Jurisdictional Statement is Title 2 U.S.C., Section 9, which was considered by the United States District Court and found that the statute did not prohibit a state from authorizing the use of a voting machine equipped with the mandatory party lever. See Opinion of the United States District Court for the District of Connecticut at page 16 of Jurisdictional Statement.

STATEMENT OF THE CASE

The voting machines used in the State of Connecticut are constructed in accordance with the provisions of Section 9-242 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, and as set forth on page 17, Appendix B, of the Jurisdictional Statement. Since first used in Connecticut all voting machines in general elections have been provided with the mandatory party lever. Each machine must be equipped with at least seven different party levers and each political party nominating candidates for any office at any election is entitled to a party lever. In addition, individuals who desire to run for public office at any election are entitled to a party lever provided they qualify by filing a petition with the Secretary of the State signed by a number of qualified electors equal to one-half of 1% of the votes cast for the same office or offices at the last preceding election (Section 9-453,

General Statutes of Connecticut, Rev. of 1958, Revised to 1964). Candidates qualifying by petition have a straight ticket lever marked "Independent" unless they are nominated by a qualified political party.

As the lower Court stated, "The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate." Jurisdictional Statement, Appendix A, Page 14.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

Neither the United States Constitution nor any Federal statute specifically requires a secret ballot. The Federal cases have construed the word "ballot" as used in 2 U.S.C., Sec. 9, as meaning "a method which will insure, so far as is possible, the secrecy and integrity of the popular vote." *Johnson v. Clark*, 25 Fed. Supp. 285 (1938). In that case each voter as he appeared before the election officials was given a number next in order to the number given to the previous voter. The voter after marking his ballot would then return it to an election official who before placing the ballot in the ballot box would mark it with the same number the voter had received on entering the polling place. The Court held that such procedures constituted a secret ballot and there was no presumption of disclosures by election officials. Furthermore, it was pointed out that the United States Constitution, Article I, Section 4, leaves the "manner" of holding elections to the States, until and unless the Congress provides otherwise.

Smith v. Blackwell, 115 F. 2d 186 (1940), concerned a situation where the custom and practice had been for any political party, having candidates, to print and provide its own ballots, which showed only the names of the candidates of that party and the respective offices for which such candidates were nominated. The plaintiffs in the action sought a declaratory judgment to the effect that the South Carolina

election law as administered violated the Federal law in that the secrecy of the ballot was not adequately preserved. The Court after quoting 2 U.S.C., Sec. 9, stated:

> "There is manifestly nothing in this (2 U.S.C., Sec. 9) which authorizes the Courts either to set up election machinery by order or to declare that the blanket or Australian form of ballot must be used or that other election practices must be followed."

The Johnson and Smith cases were cited by the lower Court only to show certain factual situations which have been held not to be in violation of what constitutes a "secret ballot".

In Connecticut the voting machine is constructed in accordance with Section 9-242, General Statutes of Connecticut, Rev. of 1958, Revised to 1964, (Appendix B — Jurisdictional Statement), and requires "voting in absolute secrecy". The pertinent portions of other Connecticut statutes regulating the voting process are quoted in the Appendix. No person in or about the voting machine can see or ascertain how any voter has voted. All party levers for all political parties nominating candidates are connected to a common bell, and there can be no distinguishing sound for any particular lever. Once a party lever is pulled, the pointers for the various candidates of any party may be manipulated by a voter at will. There is no discrimination as to any voter and each must follow the same procedures when voting.

We submit, as found by the lower Court, that the party lever does not deprive voters of a secret ballot. No one outside the actual voting booth can tell which party lever has been used by the voter or which candidate or candidates the voter has selected, or even that the voter has actually voted.

THE JURISDICTIONAL STATEMENT

The appellants in their Jurisdictional Statement (p. 7) have not cited any statute or any Court decision which sustains their position. The case of *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, involved a statute which was held invalid because it was designed to ultimately promote racial discrimination insofar as candidates for office were concerned. The Court in part stated:

> "At the outset it is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race."

On page 8 of the Statement the appellants state:

> "The basic feature of the party lever is by definition that it improperly discriminates against small political parties and the independent voter by forcing said independent voter to vote for a major party as a condition precedent to voting."

The party lever as used in Connecticut does not discriminate in any way against "small political parties". Each political party nominating a candidate or candidates is entitled to a party lever, irrespective of whether it is a major or minor party. All party levers are operated in the same manner. The appellants have not defined how or in what manner the party lever discriminates against "small political parties", nor have they cited any authority to substantiate their position.

The case of Eaton v. Brown Calif. 1892; 31 P. 250, is irrelevant since that case considered positions of candidates' names on primary ballots only.

Section 9-372 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, defines "primary" as meaning "a meeting of the enrolled members of a political party held during consecutive hours at which such members may, without assembling at the same hour, vote by secret ballot for candidates for nomination to office or for town committee members or delegates to conventions".

Thus, a primary does not involve party levers since participation therein is limited only to enrolled members of a particular political party.

In Section II, p. 9, the appellants' only claim, that the secrecy of the ballot is denied, is based upon the assumption that election officials in the polling place *might* be able to ascertain whether a person has voted a "split-ticket" because of a "discernible sound" in moving the pointers while selecting individual candidates.

The sound, if any, in moving pointers on a voting machine is the same for all pointers, including the pointers for the various questions listed on the machines, for which each voter is entitled to make a free choice.

Section 9-262 of the General Statutes of Connecticut, Rev. of 1958, Revised to 1964, provides in part "No election official shall remain or permit any person to remain in any position or near any position that would permit him *to see or ascertain how an elector votes or how he has voted.*" (Italics ours).

The argument of the appellants is based upon the pure presumption that election officials do not properly carry out their statutory duties. Their claim is without factual substantiation. We also point out that the Connecticut statutes provide severe penalties for persons violating any of the statutes regulating the prescribed manner of conducting any election.

CONCLUSION

As previously indicated under the United States Constitution, the States are empowered to regulate the manner of conducting elections until and unless the Congress provides otherwise. We submit that a voting machine which assures every elector (1) a right to cast his vote with equal facility to that offered to every other voter, (2) secrecy in the act of voting on the part of the voter, (3) free choice of candidates, (4) a correct record of the vote, and (5) a correct record and announcement of the total vote given for each candidate, meets all constitutional requirements. Connecticut voting machines meet all of these tests. As the lower Court said "The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket."

The so-called party lever is a mechanical device and it is, basically, a matter of opinion as to whether or not it facilitates the voting process. No matter how a voting machine is constructed, there will always be some with the opinion that certain changes should be made. However, differences in opinion or judgment should never be a ground for interfer-

ence by the Courts. *Comley, State's Attorney ex rel. Harrison v. Wilson*, 116 Conn. 36, 43; *Wadsworth v. Middletown*, 94 Conn. 435.

Respectfully submitted,

Appellees

By: HAROLD M. MULVEY,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

APPENDIX

PERTINENT PORTIONS OF GENERAL STATUTES OF CONNECTICUT RELATING TO METHODS OF VOTING (TITLE 9, GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958, REVISED TO 1964).

Section 9-240. Provision of voting machines and booths.

". . . The interior of the booths shall be secure from outside observation. . . ."

Section 9-242. Construction requirements.

See Jurisdictional Statement, Appendix B, Page 17.

Section 9-257. Location of machine and stationing of officials.

"The room in which the election is held shall have a railing separating the part of the room to be occupied by the election officials and the machine from the part of the room adjacent to the entrance thereof. A guard rail may be provided separating the machine from the election officials and the machine shall be placed, if possible, at least three feet from any wall or partition or guard rail of the polling place and at least four feet from the checkers' table. The exterior of the voting machine and every part of the polling place shall be in plain view of the election officials. The machine shall be so placed that no person outside the voting machine booth from any part of the room or from any place outside the room can see or determine how the elector casts his vote and shall be so placed, as far as possible, as to be in view of the officials and the electors within the polling place from the beginning of the election. The election officials shall be so stationed that no member thereof shall be concealed by the machine from the electors within the polling place. The

moderator or some one designated by him shall be stationed near the machine, shall regulate the admission of the electors thereto and shall always be in full view of the other election officials and the electors within the polling place."

Section 9-261. Process of voting.

"When an elector has entered the polling place, he shall announce his street address, if any, and his name to the checkers in a tone sufficiently loud and clear as to enable all the election officials present to hear the same, and each of the checkers shall check the name of such elector on the official registry list. If not challenged by any of the election officials, the elector shall be permitted to pass the railing to the side where the machine is located and into the voting machine booth, and he shall then register his vote in secret. Having voted, he shall immediately pass out and leave the room. . . ."

Section 9-262. Duties of election officials during voting hours.

". . . After the opening of the polls, no election official shall allow any person other than the election officials to pass within the railing to the part of the room where the machine is situated, except for the purpose of voting or except as provided in this part; and no such official shall permit more than one elector at a time to be in such part of the room. No election official shall remain or permit any person to remain in any position or near any position that would permit him to see or ascertain how an elector votes or how he has voted."

Section 9-355. Official neglect or fraud.

"Any person who, without reasonable cause, neglects

to perform any of the duties required of him by the laws relating to elections and for which neglect no other punishment is provided, and any person who is guilty of fraud in the performance of any such duty, and any person who makes any unlawful alteration in any list required by law, shall be fined not more than three hundred dollars or be imprisoned not more than one year or be both fined and imprisoned. Any official who is convicted of fraud in the performance of any duty imposed upon him by any law relating to the registration or admission of electors or to the conduct of any election shall be disfranchised. Any public officer or any election official upon whom any duty is imposed by part I of chapter 147 and sections 9-308 to 9-311, inclusive, who wilfully omits or neglects to perform any such duty or does any act prohibited therein for which punishment is not otherwise provided shall be fined not more than two thousand dollars or imprisoned not more than three years or both."